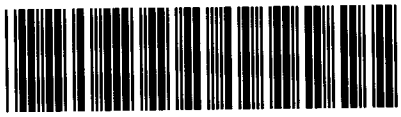

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EXHIBIT A

DOCKET NO. 39700

PETITION OF INFOTELECOM, LLC AGAINST SOUTHWESTERN BELL TELEPHONE COMPANY D/B/A AT&T TEXAS FOR POST-INTERCONNECTION DISPUTE RESOLUTION AND REQUEST FOR INTERIM RULING REGARDING UNLAWFUL ESCROW DEMAND	**§ § § § § § § § §**	**PUBLIC UTILITY COMMISSION OF TEXAS**

AT&T TEXAS' RESPONSE TO THE PETITION OF INFOTELECOM FOR POST-INTERCONNECTION DISPUTE RESOLUTION AND REQUEST FOR INTERIM RULING REGARDING UNLAWFUL ESCROW DEMAND

Comes now Southwestern Bell Telephone Company d/b/a AT&T Texas ("AT&T Texas") and files, pursuant to Order No. 1, this Response to the Petition of Infotelecom, LLC ("Infotelecom") for Post-Interconnection Dispute Resolution and Request for Interim Ruling Regarding Unlawful Escrow Demand.[1]

I. INTRODUCTION

Infotelecom has been breaching its interconnection agreement ("ICA") with AT&T Texas for many months by refusing to escrow money that the ICA requires. The purpose of the escrow is to secure funds that will be available for payment to AT&T Texas when the Federal Communications Commission ("FCC") decides how carriers should compensate each other for VoIP traffic. The amount that Infotelecom has refused to escrow for Texas is approximately $969,477.84 through July of 2011. Infotelecom has ICAs with five other AT&T incumbent local exchange carriers ("ILECs") and is acting in the same way. The multi-state cumulative amount Infotelecom refuses

[1] AT&T Texas does not waive and reserves the right to file a further Response to the Petition following any hearing and order on the request for Interim Relief, pursuant to PUC PROC. R. 21.125.

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to escrow is nearly $6 million. The longer Infotelecom can maintain the status quo – obtaining service from AT&T Texas without funding the escrow – the more Infotelecom's unwarranted profits, and AT&T Texas' potential losses, continue to grow.

Infotelecom bases its refusal to make the required escrow deposits on a self serving misapplication of the parties' ICA. Infotelecom's interpretation has no basis in the language of the ICA, and is contrary to the intent of the contracting parties. Infotelecom has no prospect of success on the merits of its claim. Infotelecom's requested relief would cause substantial harm to AT&T Texas and denial of the requested relief would not irreparably harm Infotelecom. The Commission should deny Infotelecom's request for injunctive relief.

In the balance of this Response, AT&T Texas explains why the requested interim relief is not appropriate, and provides background explaining the parties' ICA which was originally negotiated between Level 3 Communications, LLC ("Level 3") and SBC (now AT&T).

II.
STATEMENT OF FACTS AND THE ISSUE

Infotelecom and AT&T Texas are parties to an ICA that establishes terms and conditions for the exchange of communications traffic.[2] Several other AT&T incumbent local exchange carriers in other states (collectively the "AT&T ILECs" or "AT&T") are also parties to similar agreements. Infotelecom obtained its contract with the AT&T ILECs by adopting, as permitted by section 252(i) of the Telecommunications Act of 1996 Act, the ICA that AT&T previously negotiated with another competing carrier,

[2] *Petition of Infotelecom, LLC Against Southwestern Bell Telephone Company d/b/a AT&T Texas for Post-Interconnection dispute Resolution and Request for Interim Ruling Regarding Unlawful Escrow Demand* ("Petition") ¶ 3, (filed on Aug. 24, 2011).

Level 3.[3] By adopting the Level 3 agreement, Infotelecom assumed the same set of obligations that were negotiated and agreed to by Level 3.[4]

When Level 3 and SBC negotiated the ICA in 2004-2005, they disagreed about the intercarrier compensation that should apply to IP-PSTN traffic.[5] SBC maintained that unless and until the FCC issued a ruling concerning intercarrier compensation for IP-PSTN traffic, such traffic should be treated the same as all other traffic – subject to reciprocal compensation if it originated and terminated in a single local exchange area. The IP-PSTN traffic should be subject to access charges (interstate or intrastate) at SBC's tariffed rates, which are higher than reciprocal compensation rates. Level 3, on the other hand, contended that all IP-PSTN traffic should be treated the same as local traffic, subject to reciprocal compensation rates which are lower than access charges.

Level 3 and SBC arrived at a compromise, which is set forth in section 7.3 of the First Amendment to the ICA.[6] In section 7.3, the parties agreed that Level 3 would pay SBC reciprocal compensation on all IP-PSTN traffic, but that Level 3 would calculate the difference between what it paid at that rate and what it would have paid at SBC's higher tariffed access rates. Level 3 would deposit that difference – the "delta" – in an escrow account. When the FCC decided how carriers should compensate each other for IP-PSTN traffic, the outcome of the FCC's decision would be applied to the escrowed

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[3] *Id.* ¶ 19. AT&T's predecessor, SBC negotiated the ICA with Level 3. SBC subsequently acquired legacy AT&T Corp. and changed its name to "AT&T Inc."

[4] Docket No. 34643, *Joint Application of Southwestern Bell Telephone Company dba AT&T Texas and Infotelecom, LLC for Approval of Interconnection Agreement Under PURA and the Telecommunications Act of 1996 (approved Sept. 4, 2007).*

[5] IP-PSTN traffic is voice traffic that originates with the calling party in IP (Internet Protocol) format and that is later converted to traditional circuit switched format in order to be terminated to an end user on the Public Switched Telephone Network.

[6] Exhibit B to Infotelecom's Petition. The "First Amendment Superseding Certain Intercarrier Compensation, Interconnection and Trunking Provisions" ("First Amendment") was executed at the same time as the underlying ICA that it amended.

funds to be disbursed accordingly – to SBC if the FCC subjected interexchange IP-PSTN traffic to access charges, and to Level 3 if the FCC subjected that traffic to reciprocal compensation. The parties agreed that Level 3's obligation to escrow the delta would not be triggered until the total delta exceeded $500,000. Thus, section 7.3 provided:

> The Party delivering IP-PSTN Traffic for termination to the other Party's end user customer (the "Delivering Party") shall pay to the other party the rate for Total Compensable Local Traffic as defined in Section 6 above. On a monthly basis, no later than the 15th day of the succeeding month to which the calculation applies, the Delivering Party shall report its calculation of the difference between the amounts Level 3 paid to SBC for terminating such traffic (at rates applicable to Total Compensable Local Traffic (as defined herein) and the amounts Level 3 would have paid had that traffic been rated according to SBC's intrastate or interstate switched access tariffs based upon originating and terminating NPA-NXX ("Delta"). By the first day of the following month, the Parties will agree on the amount of the Delta. At such time as the Delta exceeds $500,000 the Parties will negotiate resolution of the Delta for a period not to exceed eleven (11) business days. If the Parties are unable to reach resolution, Level 3 shall pay the Delta into an interest bearing escrow account with a First Party escrow agent mutually agreed upon by the Parties.

The $500,000 figure in section 7.3 is a cumulative total, for the term of the agreement as opposed to a month to month trigger.[7]

Infotelecom adopted the Level 3 ICA in September of 2007 and has inaccurately interpreted section 7.3 in a manner that would excuse it from depositing any amounts into escrow. In October 2009, AT&T Texas invoked its rights under the ICA and informed Infotelecom that it was initiating the 11-day negotiation period required by

[7] It is also an aggregate number that comprises the deltas for all states to which the ICA pertains – although that interstate aggregation is irrelevant for Texas, where the delta far exceeds $500,000 without even considering deltas associated with other states.

section 7.3.[8] The parties' disagreement persisted, and since Infotelecom refused to negotiate, AT&T Texas sent Infotelecom a letter demanding that Infotelecom establish an escrow account for the full amount of the delta within 14 business days. Infotelecom refused.[9]

On January 14, 2011, AT&T Texas wrote to Infotelecom, informing it that the multi state delta now exceeded $2 million. By that point, the delta for Texas and California each exceeded $500,000. Accordingly, AT&T Texas stated it was commencing an 11-day negotiation period to seek a resolution for Texas and California. Following impasse with Infotelecom, AT&T Texas notified Infotelecom that it was in material breach of the ICA and that pursuant to the ICA, Infotelecom had 45 days to cure the material breach by escrowing the total delta.[10] That letter also stated that if Infotelecom did not cure the material breach, AT&T Texas would pursue any and all rights and remedies including termination of the ICA.

On May 5, 2011, Infotelecom filed a federal court complaint in Connecticut against AT&T Texas and the other AT&T ILECs with which it exchanges traffic, seeking declaratory relief and asking the federal court to enjoin AT&T from terminating the ICA.[11] On July 15, 2011, the federal court dismissed for lack of jurisdiction Infotelecom's claim regarding the interpretation of the ICA, and also dismissed

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[8] Kitty Drennan's Affidavit ("Drennan Aff.") at ¶ 4. Ms. Drennan's affidavit is attached hereto as Attachment A. The Exhibits attached to her affidavit are voluminous and for that reason are not attached. AT&T Texas will provide the exhibits upon request by the Arbitrators. Ms. Drennan's affidavit was originally filed in the federal lawsuit.

[9] *Id.* ¶¶ 7-8.

[10] *Id.* ¶¶ 6-11.

[11] *Infotelecom, LLC vs Illinois Bell Telephone Company, et al.,* Civil Action No. 3:11-CV-739 (JCH), U.S. District Court Connecticut ("Infotelecom v Illinois Bell").

Infotelecom's request for injunctive relief.[12] On August 17, 2011, AT&T Texas sent Infotelecom a notice informing it that the ICA would be terminated on September 1, 2011 unless Infotelecom escrows the funds it is required to escrow under the agreement. On August 24, 2011, Infotelecom filed the instant complaint at the Texas Public Utility Commission. AT&T ILECs and Infotelecom are parties to parallel state commission proceedings in five other states – California, Illinois, Indiana, Michigan, and Ohio. In this Response, AT&T Texas, addresses Infotelecom's Texas obligations.

III.
ARGUMENT

A. Infotelecom's Prospects on the Merits of its Claim are Nil.

The delta amount for Texas alone is nearly double the $500,000 trigger described in section 7.3, and Infotelecom is obligated to pay the full amount of the delta into escrow. By refusing to do so, Infotelecom has materially breached the parties' ICA, resulting in AT&T Texas terminating the ICA. Infotelecom does not dispute that AT&T Texas is entitled to terminate the ICA in the event of a material breach. Thus, the only way Infotelecom could avoid termination – other than by depositing the delta amount in escrow – is by arguing that the delta amount does not accumulate from month to month.[13] As demonstrated below, Infotelecom cannot prevail, because the $500,000 trigger amount in section 7.3 is clearly a cumulative amount. Infotelecom's agreement is self serving and a transparent attempt to avoid payment.

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[12] *Id.* ¶ 38.

[13] While the parties also disagree about whether the delta is an aggregate number that encompasses all the states in which AT&T and Infotelecom exchange traffic, that disagreement makes no difference in Texas, because the Texas delta on its own exceeds $500,000. Because Infotelecom's contention that the delta does not aggregate across states does not apply here, AT&T Texas does not address it in this submission and the Commission need not rule on it.

"[A] contract's overriding purpose is to capture the parties' intent," so a court or agency "must construe it in light of how the parties meant to construe it."[14] The focus is "on the language used in the contract because it is the best indication of the parties' intent."[15] Contractual language "should be given its plain grammatical meaning unless it definitely appears that the intention of the parties would thereby be defeated."[16] The contact is to be interpreted "in light of the circumstances at the time the contract was drafted."[17]

The entire contract must be examined "in an effort to harmonize and effectuate all of its provisions so that none are rendered meaningless.[18] "No single provision taken alone will be given controlling effect; rather, all the provisions must be considered with reference to the whole instrument."[19] The court or agency "should avoid a construction that is unreasonable, oppressive, inequitable, or absurd."[20]

Applying those principles here, the only possible conclusion is that the trigger amount for the negotiation/escrow provision in section 7.3 is a cumulative amount that grows from month to month over the term of the ICA. The only language in section 7.3,

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[14] *Intercontinental Group Partnership v. KB Home Lone Star L.P.*, 295 S.W.3d 650, 657-58 (Tex. 2009).

[15] *Reliance Ins. Co. v. Hibdon*, 333 S.W.3d 364, 369 (Tex. Ct. App. 2011) (citing *Perry Homes v. Cull*, 258 S.W.3d 580, 606 (Tex. 2008)).

[16] *Reilly v. Rangers Mgmt., Inc.*, 727 S.W.2d 527, 529 (Tex. 1987).

[17] *MJCM, LLC. v. First Georgia Bank, Inc.*, 392 F. Supp. 2d 901, 904 (S.D. Tex. 2005) (citing *Columbia Gas Transmission Corp. v. New Ulm Gas, Ltd.*, 940 S.W.2d 587, 589 (Tex. 1996)).

[18] *Reliance Ins. Co.*, 333 S.W.3d at 369 (citing *Seagull Energy E & P, Inc. v. Eland Energy, Inc.*, 207 S.W.3d 342, 345 (Tex. 2006)).

[19] *Seagull Energy*, 207 S.W.3d at 345.

[20] *Pavecon, Inc. v. R–Com, Inc.*, 159 S.W.3d 219, 222 (Tex. Ct. App. 2005).

clearly states that the obligation to escrow is triggered. "*At such time as the Delta exceeds $500,000*, . . ."[21]

There is ample evidence to support this meaning consistent with Level 3 and SBC intentions when they negotiated section 7.3. And *all* the evidence – including the negotiation documents and the testimony of SBC *and* Level 3 negotiators – makes clear that Level 3 and SBC intended the delta amount to be cumulative. This evidence includes the Affidavit of SBC negotiator Brian K. Van Hoof[22] as well as the deposition of the principal negotiator for Level 3, Rogier Ducloo.[23] Mr. Van Hoof's Affidavit recounts in detail the negotiation of section 7.3 over a period of several months, and the excerpts from Mr. Ducloo's deposition confirms Mr. Van Hoof's account.

The testimony of both witnesses, and the negotiation documentation, conclusively show that the $500,000 trigger amount for the escrow originated in a proposal by Level 3.[24]

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[21] Infotelecom states that section 7.3 of the ICA "will be interpreted in Infotelecom's favor." Petition ¶ 53. To the extent Infotelecom suggests the ICA should be construed against AT&T, that contention fails for two reasons. *First*, the legal principle on which it relies is that an ambiguous contract is construed against the *drafter*. Here, there is no evidence that AT&T (or SBC), rather than Level 3, drafted the disputed language. *Second*, the First Amendment expressly provides (in § 9.4) that it is the "joint work product of the Parties and has been negotiated by the Parties and their respective counsel and shall be fairly interpreted in accordance with its terms and, in the event of any ambiguities, no inferences shall be drawn against either Party." When Infotelecom adopted Level 3's ICA, it took the whole agreement. Infotelecom stands in *exactly* the same shoes as Level 3 under the contract, and it knew it was stepping into those shoes when it adopted the agreement. Under Infotelecom's absurd view, the contract could mean one thing with respect to Level 3, and quite another thing with respect to Infotelecom. That is not the way section 252(i) of the 1996 Act works.

[22] Mr. Van Hoof's Affidavit ("Van Hoof Aff.") is attached hereto as Attachment B (redacted version). The Confidential Version of Mr. Van Hoof's affidavit is filed under seal. The Exhibits attached to his affidavit are voluminous and for that reason are not attached. AT&T Texas will provide the exhibits upon request by the Arbitrators. Mr. Van Hoof's affidavit was originally filed in the federal lawsuit.

[23] Attachment C are Excerpts of Rogier Ducloo's Confidential Deposition, dated June 24, 2011 ("Ducloo Dep.") and are filed under seal.

[24] Ducloo Dep. at 118, l. 14 – 120, l. 24.

Based on Mr. Ducloo's explanation of the reason for the change, SBC agreed to increase the escrow trigger from $50,000 to $500,000.[25] Subsequently, Level 3 sent SBC revisions to a term sheet from which the parties were working. The term sheet, as marked up by Level 3, states, "The escrow account will be established once the ***cumulative*** difference in amounts described above exceeds $500K. The ***cumulative*** difference will be deposited into the escrow account."[26]

Thus, it was Level 3's and SBC's shared understanding and intent from the first mention of the $500,000 trigger amount that it was a cumulative number, increasing from month to month.[27] That understanding and intent never changed.[28]

Indeed, SBC would never have agreed to section 7.3 if it meant what Infotelecom now claims. Under Infotelecom's claim, the whole purpose of the escrow requirement would be defeated. Given the relatively low volume of IP-PSTN traffic at the time, SBC did not expect Level 3's delta to hit $500,000 in a single month in a single state.[29] Employing Infotelecom's reading, unfairly results in no meaningful escrow requirement. In such a scenario AT&T Texas would have no protection at all in the event Level 3 became insolvent.[30] Thus, the reading advocated by Infotelecom produces an absurd result, implicates millions of dollars in dispute, and affords no escrow protection – a

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[25] Van Hoof Aff. ¶¶ 13-14.
[26] Van Hoof Aff. ¶ 12.
[27] Van Hoof Aff. ¶¶ 13, 14, 20.
[28] *Id.* ¶¶ 13, 14, 20; Ducloo Dep. at 120, l. 13 – 121, l. 9.
[29] Van Hoof Aff. ¶ 22.
[30] *Id.* ¶¶ 21-22.

fundamental requirement of the ICA. Section 7.3 cannot properly be read to yield such a result.[31]

For misplaced support, Infotelecom focuses on the sentence in section 7.3 that requires the delta to be reported every month.[32] But that sentence sheds no light on whether the delta is cumulative. Even a cumulative delta would be reported periodically; otherwise, the parties would have no way to know when the trigger was reached.

The sentence on which Infotelecom relies simply gives no indication whether the delta is a monthly number or a cumulative number. Again, the only language in section 7.3 that sheds light on that question is the trigger language itself – "At such time as the Delta exceeds $500,000" – and that phrase clearly anticipates accumulation.

In sum, the language of section 7.3 communicates with adequate clarity that the delta grows from month to month; nothing in section 7.3 suggests otherwise. Not only is the contract language clear enough, the negotiation history is conclusive. Because Infotelecom can not prevail on its argument that the delta does not accrue month to month, and because the state-specific delta for the state of Texas has exceeded $500,000, Infotelecom's arguments are unfounded. For that reason alone, Infotelecom's Request for Interim Relief must be denied.

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[31] *E.g., Newmont Mines Ltd. v. Hanover Ins. Co.*, 784 F.2d 127, 135 (2d Cir. 1986) (in construing contracts, "absurd results should be avoided"); *Pavecon, Inc.*, 159 S.W.3d at 222 (courts and agencies "should avoid a construction that is unreasonable, oppressive, inequitable, or absurd").

[32] Petition ¶¶ 24, 29, 32, 42-43, 53.

B. Infotelecom's purported showing of irreparable harm to itself and lack of harm to AT&T Texas does not justify the entry of the interim relief Infotelecom requests.

For all the reasons discussed above, Infotelecom cannot demonstrate a likelihood of success on the merits. Consequently, its request for interim relief would properly be denied even if that meant Infotelecom would suffer an irreparable harm.[33]

Infotelecom's claim of harm is of its own making. Courts have long recognized that self-inflicted harm is not "irreparable" and thus will not support a request for injunctive relief.[34] Here, any harm that Infotelecom may suffer if the Commission denies its request for injunctive relief would be self-inflicted. To avoid the termination that it asserts as irreparable harm, Infotelecom need only pay into escrow the amounts it is supposed to have paid under the parties' contract. If Infotelecom deposited the delta into escrow and the Commission were to ultimately agree with Infotelecom's reading of section 7.3, the escrowed funds would be returned to Infotelecom, and the only harm Infotelecom would have suffered would be the cost of establishing and maintaining the escrow. If Infotelecom needs to borrow to pay the delta into escrow, so be it – the interest is measurable and becomes another element of what AT&T Texas would have to pay Infotelecom in the hypothetical event that Infotelecom were to prevail on the

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[33] *E.g.*, *Long John Silver's Inc. v. Martinez*, 850 S.W.2d 773, 775 (Tex. Ct. App. 1993) ("To warrant the issuance of a temporary injunction, the movant must show: (1) probable right to recovery; (2) that imminent and irreparable harm will occur in the interim if the request is not granted; *and* (3) that no adequate remedy at law exists.") (emphasis added) (citing *Sun Oil Co. v. Whitaker,* 424 S.W.2d 216, 218 (Tex. 1968)).

[34] *E.g.*, *Crestview, Ltd. v. Foremost Ins. Co.*, 621 S.W.2d 816, 829-30 (Tex. Ct. App. 1981) (finding no irreparable harm and denying request for injunction where any injury would be "self-inflicted"); *K.D. v. Oakley Union Elementary School Dit.*, No. C 07-00920, 2008 WL 360460, at *11 (N.D. Cal. Feb. 8, 2008) ("harm is not irreparable if self-inflicted"); *Bristol Technology, Inc. v. Microsoft Corp.*, 42 F. Supp. 2d 153, 162 (S.D. Conn. 1998) (same); *see generally* 11A Charles A. Wright et al., Federal Practice & Procedure § 2948.1 (2d ed. 1995) ("*FPP*") ("Not surprisingly, a party may not satisfy the irreparable harm requirement if the harm complained of is self-inflicted.").

merits. Infotelecom is not entitled to an emergency injunction unless it demonstrates that it would suffer irreparable harm by escrowing the delta that it is obliged to escrow. Infotelecom cannot make that showing.

Another mandatory showing that Infotelecom cannot make is that its requested relief would not cause harm to AT&T Texas that would outweigh any harm to Infotelecom in the absence of interim relief. According to Infotelecom, AT&T Texas will not be harmed if the Commission issues the relief Infotelecom requests.[35] But AT&T Texas indeed faces substantial harm from the requested relief, as a federal court ruled just days before the filing of this Response.[36]

On August 30, 2011, the United States District Court for the District of Connecticut, which had previously terminated as moot Infotelecom's request that it enjoin the AT&T ILECs from terminating Infotelecom's ICAs, entered an Order denying Infotelecom's motion for preliminary injunction pending Infotelecom's appeal of the court's earlier decision.[37] In that Order, the district court soundly rejected Infotelecom's argument – the same argument it makes here – that the AT&T ILECs would not be harmed by the granting of the relief Infotelecom requested. The court explained:

> Issuing a stay and an injunction would expose AT&T to an increased risk that Infotelecom will be unable to satisfy its potential financial obligation to AT&T. Indeed, Infotelecom has acknowledged during discovery "that it is not financially able to escrow the cumulative delta amount across the 13-State region of the AT&T ILECs, assuming that amount is, as AT&T calculates, $4,935,981.58." . . . That is, Infotelecom is unable to escrow the $4.9 million in dispute with liquid assets "without having a material impact on Infotelecom's business operations." . . .

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[35] Petition ¶ 52.

[36] Infotelecom v Illinois Bell; Ruling Re: Plaintiff's Motion to Stay and for Preliminary Injunction [Doc. No. 82] (Aug. 30, 2011); attached hereto as Attachment D.

[37] *Id.*

> Infotelecom requests an injunction requiring AT&T to continue permitting Infotelecom to access AT&T's network without escrowing the funds AT&T believes are required by the Interconnection Agreement and which may ultimately be payable to AT&T if the FCC rules that IP-PSTN traffic is subject to additional intercarrier compensation obligations. Such an injunction would constitute a substantial injury to AT&T, because Infotelecom would accrue additional "delta" that could ultimately be due to AT&T, even though Infotelecom has already conceded that it cannot post the existing "delta" without materially impacting its business operations.
>
> Infotelecom protests that AT&T has not proven that Infotelecom would be unable to obtain funds to make up any difference between cash on hand and the amount required to be escrowed under AT&T interpretation of the Interconnection Agreement. . . . Infotelecom supports this claim with the assertion that it "would be able to raise $4,935,981.58 from investors and lenders if it could identify investors and lenders willing to invest or loan such funds to Infotelecom." . . . Such circular statements provide no assurance that Infotelecom could produce the disputed funds if AT&T prevailed in its interpretation of the Interconnection Agreement. In light of Infotelecom's admission that it is unable to escrow the disputed funds without materially impacting its business operations, the court finds that issuance of a stay and an injunction would substantially injure AT&T. (Citations omitted.)

The court was correct. SBC specifically insisted upon the delta and escrow provisions in the ICA to provide a source of recoverable funds in the event Level 3 became insolvent, as other competing carriers had.[38] When Infotelecom adopted the Level 3 ICA, it became bound by the same delta and escrow provisions. As the district court concluded, if Infotelecom were allowed to avoid its obligations under those provisions while still receiving service from AT&T Texas, the delta, and AT&T Texas' potential losses, would continue to grow. And Texas courts have long held that a party may be substantially harmed if it is unable to collect on a judgment entered in its favor,

[38] Van Hoof Aff. ¶¶ 8, 22.

including where the opposing party would be "judgment proof" due to insolvency.[39] Infotelecom is thus unable to show that the balance of harms favors its position, as required by PUC PROC. R. § 21.129(g), and it is therefore not entitled to the requested interim ruling.

C. If the Commission grants the requested interim ruling, it should require a bond sufficient to protect AT&T Texas against loss.

Finally, while the Commission should never reach this step, any injunctive relief it considers must be conditioned on Infotelecom providing a bond sufficient to secure AT&T Texas' rights. Specifically, the Commission should require Infotelecom to pay into escrow all new delta dollars that accrue while any interim relief is in effect.[40] The purpose of requiring security upon the issuance of a temporary injunction is to afford compensation to the party wrongly enjoined or restrained.[41]

As discussed above, the harm that AT&T Texas will suffer if it is enjoined from disconnecting service to Infotelecom is both concrete and substantial. Any additional services provided by AT&T Texas to Infotelecom will only increase the amount of the un-escrowed delta. Accordingly, any injunctive relief this Court considers should be conditioned on a requirement that Infotelecom pay into escrow all new delta dollars as

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[39] *E.g., In re Estate of Minton*, No. 13–11–00062–CV, 2011 WL 2475394, at *4 (Tex. Ct. App. June 23, 2011) (affirming a finding of irreparable injury where source of potential funds for satisfaction of money damages was at risk) (citing *Surko Enters. v. Borg–Warner Acceptance Corp.*, 782 S.W.2d 223, 225 (Tex. Ct. App. 1989)); *see generally FPP* § 2948.1 ("Even if a loss is fully compensable by an award of money damages, however, extraordinary circumstances, such as a risk that the [opposing party] will become insolvent before a judgment can be collected, may give rise to . . . irreparable harm").

[40] Texas R. Civ. P. § 684 (conditioning the availability of temporary injunctive relief on the requirement that an injunction applicant "execute and file with the clerk a bond to the adverse party . . . conditioned that the applicant will abide the decision which may be made in the cause, and that he will pay all sums of money and costs that may be adjudged against him if the restraining order or temporary injunction shall be dissolved in whole or in part.").

[41] *Montemayor v. Ortiz*, 208 S.W.3d 627, 650 n.13 (Tex. Ct. App. 2006) (purpose of injunction bond is to protect defendant from harm he may sustain as result of temporary relief).

they accrue while any emergency relief is in effect. Only such a bond would provide any assurance that AT&T Texas would be made whole if the Commission were to grant injunctive relief now and later conclude, as it inevitably would, that AT&T Texas' reading of the ICA is correct.

Infotelecom notes that it agreed to deposit $150,000 into escrow against the nationwide delta in exchange for AT&T's agreement not to disconnect service to Infotelecom until the Connecticut federal court ruled on Infotelecom's motion for preliminary injunction.[42] That is irrelevant, because Infotelecom has already received the full benefit it bargained for when it agreed to deposit that $150,000 – namely, AT&T's forbearance from termination through July 15, 2011, when the district court dismissed Infotelecom's motion for preliminary injunction. The relative pittance that Infotelecom deposited in escrow in order to obtain AT&T's agreement not to terminate the various AT&T ILECs' ICAs with Infotelecom is no substitute for a bond to secure AT&T Texas against the loss to which it would be exposed by *further* delay resulting from emergency relief.

In short, if the Commission finds that Infotelecom's extraordinary request for interim relief is well-taken (and it should not), then an injunction should issue only on the condition that Infotelecom pay into escrow all new delta dollars as they accrue while any interim relief is in effect.

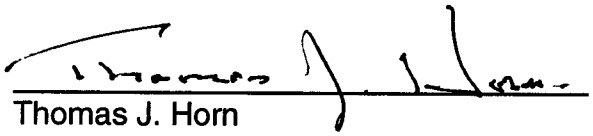
[42] Petition ¶ 37.

IV.
CONCLUSION

The Commission should deny Infotelecom's request for interim relief. Infotelecom's prospects on the merits of its claim are nil. The state-specific Texas delta alone totals much more than $500,000 and Infotelecom will not succeed on its argument that the delta is not calculated cumulatively on a month to month basis. Both the plain language of the contract and the undisputed evidence of SBC and Level 3's intent support AT&T Texas' position. Additionally, Infotelecom does not meet its burden to show that the balance of harms favors its position. The Commission should therefore deny the request for interim relief, or in the alternative, require a bond sufficient to protect AT&T Texas against loss.

Respectfully submitted,

JOSEPH E. COSGROVE, JR.
General Attorney and Associate General Counsel - Austin



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CERTIFICATE OF SERVICE

I, Thomas J. Horn, General Attorney for AT&T Texas, certify that a true and correct copy of this document was served to all parties hereto on September 2, 2011, in the following manner, via: U.S. Mail, electronic mail, facsimile, or overnight delivery.